IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 8631 of 2004
with
Civil Application No.554 of 2006

Ahmed Raza Kazim Raza
Moulvi ..Petitioner

vs.

Ms.Batul Ahmed Raza
Moulvi ..Respondent

Shri A.N.Maniar for petitioner.
Shri Ajit J.Shobhawat for respondent.

CORAM: S.B.MHASE J.
28th March, 2006

P.C.

1. Heard both the learned Counsel.

2. This petition is directed against the order passed by the Family Court on 2nd September,2004 on Interim application No.129/2004 (Exh.8) in Petition No.D-33 of 2000 along with petition No.B-28 of 2003 and R.D.No.494 of 2002. The application No.128 of 2004 (Exh.8) was the application filed by the petitioner for varying and modifying the order dated 16th April, 1999 passed by the learned single Judge of this Court, by which the petitioner husband was directed to pay the maintenance at the rate of Rs.15,000/- p.m. to respondent wife. This modification was

sought on a ground that since petitioner has lost his job in March,2000 petitioner is not liable to pay any maintenance from that date. The said application was rejected by impugned order. So also the Regular Darkhast No.494 of 2002 was pending and in that darkhast further order in respect of attachment of the flat etc. of the petitioner was passed by Family Court. Since the petitioner/husband remained in arrears of maintenance for last 4 years his defence is struck down and order to proceed exparte was passed by Family Court on 2nd September, 2004. All these orders are unchallenged by this petition before this Court.

3. This Court has issued notice and granted ad-interim relief in terms of prayer clause (b) on 29th October, 2004 subject to payment of 10% of arrears of maintenance which came to Rs.70,000/- The said amount has been deposited by the petitioner. The learned Counsel further states that further amount of Rs.35,000/- has also been deposited in view of order dated 7th March, 2006 passed by this Court. Under these circumstances this court is considering this matter for admission.

4. Initially M.J.suit no.49 of 1998 was sfiled in this Court in respect of the matrimonial dispute between the respondent/wife and the petitioner/husband. In the said suit the respondent was the petitioners and present petitioner was respondent. In the Notice of Motion No.734 of 1998, this Court by order dated 16th April, 1999 decided the amount of interim alimony at the rate of Rs.15,000/- p.m. from the date of the application i.e.March, 1998 to March, 1999 and calculated the said amount at Rs.1,80,000/- The Court further deducted the amount of Rs.2000/- which was paid by the husband at the rate of Rs.1000/- p.m. and thus on the date of order it was found that a sum of Rs.1,68,000/- was in arrears and further it was directed that the husband shall go on depositing the monthly maintenance at the rate of Rs.15,000/-

5. The said order was challenged by filing appeal no.1105 of 1999 before the Division Bench of this Court and the said appeal was dismissed on 23rd September, 1999 by the Division Bench comprising of S.H.Kapadia and

Smt.K.K.Baam JJ. Thereafter the review petition (Ld) No.34 of 2001 was filed in which Notice of Motion No.1664 of 2001 was pressed for condonation of delay and the said notice of motion was allowed and delay was condoned. However, the review petition was rejected by order dated 13th October, 2003. The said order was passed by the Division Bench comprising of H.L.Gokhale and R.S.Mohite JJ. Thereafter respondent/wife has filed contempt petition No.90 of 1999. The petitioner/husband was/is found guilty of the civil contempt and was punished to undergo simple imprisonment for a term of 90 days from the date of arrest and to pay a fine of Rs.2000/- In default of payment of fine further punishment of simple imprisonment of one month was imposed. As against the order passed in the contempt petition the appeal was preferred before the Division Bench bearing appeal no.253 of 2004 and the Division Bench comprising of R.M.Lodha and J.P.Devadhar JJ. by order dated 18th July, 2005 has passed the conditional order and directed to deposit the sum of Rs.1,00,000/- The said amount as per the directions of the Division Bench was not deposited. Thereafter Notice of Motion

No.2277 of 2005 was taken out by the husband in appeal No.253 of 2004 for seeking extension of time to deposit the amount. The said motion was dismissed on 7th October, 2005. Thereafter again another notice of motion no.3195 of 2005 was taken out for depositing the amount of Rs.1,00,000/- and the said motion also came to be dismissed on 27th October, 2005.

6. It appears that the Full Bench of this Court in the matter of Romila Jaidev Shroff Vs. Jaidev Rajnikant Shroff reported in A.I.R.2000 Bom.356 observed that when the High Court exercises its Ordinary Original Civil Jurisdiction in relation to the matters under the Family Courts Act, it would be a district Court as understood therein. It cannot be said that in spite of the said provisions of the Family Courts Act, the High Court retains its Ordinary Original Civil Jursidction. It is observed in para 31 "that when thus interpreted, in our opinion, the conclusion would be inescapable that when the High Court exercises its Ordinary Original Civil Jursidction in relation to the matters under the Family Court Act, it would be a district

Court as understood therein. It would, therefore, lose its jurisdiction. In para 32 it is further observed that as the matters were being entertained by this Court on account of a Division Bench judgment holding the field, which because of the judgment delivered by us, position will now alter. By way of consequential order, it is directed that the interim relief, if granted in all the pending matters, they shall stand extended for a period of eight weeks. The office shall accordingly give effect to this direction in all the pending matters. The Prothonotary and Sr.Master shall prepare a list of all the matters affected by our judgment and shall also place on the notice board intimating the effect thereof to all concerned."

7. After transfer of the petition from this Court to the Family Court the above referred orders were passed by the Family Court which are impugned in this petition. It is to be noted that the Family Court has found that on the date of order the arrears amounted to the extent of approximately Rs.7,00,000/- Out of that amount I find that as per the directions of this Court, the amounts of Rs.70,000/- and

Rs.35,000/- was deposited. The amount of Rs.23,000/- has been paid from 18th January, 1998 to 5th May, 1999 from time to time and Rs.1,04,800/- was paid in August, 1999. Thus, till this date the total amount of maintenance paid by the petitioner is Rs.2,32,800/-.

8. Now, the ground made out by the learned Counsel is that the order passed by the learned single Judge of this Court fixing the maintenance cannot be executed because the same was without jurisdiction in view of the judgment of this Court reported in A.I.R.2000 Bom.356 (supra).

9. Learned Counsel also relies upon the judgments of the Apex Court in Urban Improvement Trust, Jodhpur Vs.Gokul Narain (dead) by Lrs.and another reportedin (1996) 4 S.C.C.178 and in the case of Sushil Kumar Mehta Vs.Gobind Ram Bohra (dead) through LRS reported in (1990) 1 SCC 193 as also the judgment of this Court in the case Kirtikumar Dhanjibhai Shah Vs.Sudhalaxmi Mohanlal Jhaveri and another reported in 1998(3) Mh.L.J. 590 and submitted that the decree under execution is a nullity. It is pertinent to note that

this ground was not taken before the Family Court when matter was argued for impugned order. It is to be noted that this point was not raised when the appeal was filed against the order before the Division Bench of this Court. It was also not raised in the review petition referred to above. It is equally not raised in the contempt petition referred to above. All these orders were passed by this Court. As a result of non raising of such a ground, which was very much available for being argued. It can be concluded as being barred by constructive resjudicata. Apart from that the judgment of the Full Bench of this Court reported in A.I.R.2000 Bom.356 (supra) upon which the said ground is tried to be developed has granted protection to the orders passed by this Court in view of para 32 of the said judgment which is reproduced above. Taking into consideration the overall litigation, the manner of its protraction at the behest of the husband and requiring the wife to go from piller to post for recovery of maintenance satisfies this Court that by hook or crook the petitioner is desirous of not paying any amount of maintenance inspite of the directions of the Court. Under these

circumstances, this Court finds that wife is starving for maintenance amount for years together and she is being dragged in proceedings after proceedings either before the Family Court or this Court. Only some partly amount at the admission stage of every proceedings have been paid and thereafter no efforts have been made to satisfy the dues of the wife. Under these circumstances, when it is noticed that the point is for the first time raised in the writ petition which prima facie appears to have been covered up by the Full Bench judgment which gives validity to the orders which are passed by this Court, this Court finds it proper not to entertain the petition. Taking over all view of the matter, this Court is inclined to hold that discretionary jurisdiction under Articles 226 and 227 will not be exercised in favour of the petitioner and, therefore, refuses to entertain the petition. Petition is hereby rejected in limine.

10. Amount deposited in this Court is hereby allowed to be withdrawn by the respondent wife.

11. In view of rejection of the petition Civil Application No.554 of 2006 does not survive and hence rejected.

(S.B.MHASE J.)